

2.0 DEFINITIONS

2.1 Adjusted Improvements Budget. “Adjusted Improvements Budget” means (a) if there are no Deferred Maintenance Savings, the Improvements Budget, or, (b) if there are Deferred Maintenance Savings, then the sum of Seven Million and No/100 Dollars (\$7,000,000.00) plus the amounts contributed by the City and Club to the Cost of Improvements pursuant to Section 3.2.2(c).

2.2 Architect. “Architect” means Roughton Nickelson De Luca Architects, PA.

2.3 Architect Contract. “Architect Contract” means the architectural contract between the City and the Architect.

2.4 Architectural Services. “Architectural Services” means the architectural, structural, mechanical, electrical, plumbing, civil, and other services described in the Architect Contract.

2.5 Ballpark or DBAP or Premises. “Ballpark” or “DBAP” or “Premises” means the facility owned by the City commonly known as of the Effective Date as Durham Bulls Athletic Park.

2.6 City’s Authorized Project Manager. “City’s Authorized Project Manager” means the City designated employee from the Department of General Services that will serve as the primary City contract for oversight and review of the CMAR Services and Architectural Services.

2.7 Club Work. “Club Work” means the work that Club will perform directly and not through the CMAR Contract as more particularly described in Section 3.1.3.

2.8 CMAR. “CMAR” means Lend Lease (US) Construction, Inc.

2.9 CMAR Contract. “CMAR Contract” means the contract between the City and the CMAR.

2.10 CMAR Services. “CMAR Services” means the construction manager at-risk services described in the CMAR Contract.

2.11 Construction. “Construction” shall mean constructing with its own employees and forces and/or causing the construction to occur by means of entering into agreements with other persons. It includes new construction, reconstruction, repair, and renovation, and includes the purchasing, acquiring and renting apparatus, supplies, materials and equipment as appropriate for that work.

2.12 Cost. “Cost” means all costs associated with the Project including the cost of Architectural Services, the cost of CMAR Services, the cost of construction, the cost of testing

services, and the cost of other consultants that the City or Club may retain. Cost does not include any North Carolina sales taxes paid on the Deferred Maintenance Items and the Improvements, provided, however, the CMAR and the Club shall provide to the City evidence of sales taxes paid and thereafter assists the City in preparing documentation necessary for the City to seek a refund of sales taxes paid on the Project for qualifying materials.

2.14 Deferred Maintenance Items Budget. “Deferred Maintenance Items Budget” means the budget the Parties have established for the Cost of the Deferred Maintenance Items and as further described under Section 3.2.1.

2.15 Deferred Maintenance Items. “Deferred Maintenance Items” means the list of items described in Exhibit A that are to be addressed in the final Plans and Specifications to become part of the Scope of Work.

2.17 Deferred Maintenance Savings. “Deferred Maintenance Savings” means any savings that might materialize in the Deferred Maintenance Items Budget and the Cost of the Deferred Maintenance Scope of Work.

2.18 Improvements. “Improvements” means the list of items described in Exhibit B that are to be addressed in final Plans and Specifications to become part of the Scope of Work.

2.20 Improvements Budget. “Improvements Budget” means the budget the Parties have established for the Cost of the Improvements and as further described under Section 3.2.2.

2.21 Improvements Percentage. “Improvements Percentage” means 85.7% for the City and 14.3% for Club.

2.23 Minimum Club Investment. “Minimum Club Investment” means the minimum amount of Club’s financial contributions to the Project, including Club’s investment in the Improvements and Club’s Work, which amount will be \$2 Million.

2.24 Plans and Specifications. “Plans and Specifications” means the plans and specifications that include both the Deferred Maintenance Items and Improvements.

2.25 Preconstruction Period. “Preconstruction” means the period of time between the Effective Date and the date when construction bids are opened.

2.26 Project. “Project” means the Deferred Maintenance Items, Improvements, and Club Work.

2.27 Project Budget. “Project Budget” is the sum of the Deferred Maintenance Items Budget, the Improvements Budget, and the Club Work.

135 **2.28 Project Schedule.** “Project Schedule” means the schedule for completing the
136 design, commencing construction, and completing construction of the Project, which schedule is
137 attached hereto as Exhibit C.
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139 **2.29 Scope of Work.** “Scope of Work” means the work necessary to complete each of
140 the Deferred Maintenance Items, the Improvements, and the Club Work, as more particularly
141 described in Section 3.1.
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143 144 **3.0 CLUB AND CITY OBLIGATIONS**

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146 **3.1 Scope of Work.** Club and the City have agreed upon the Project’s Scope of
147 Work, which consists of Deferred Maintenance Items, Improvements, and Club Work.
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149 3.1.1 Deferred Maintenance Items. Subject to the Deferred Maintenance Items Budget,
150 the City will be responsible for implementing the Deferred Maintenance Items. The City will
151 perform the work anticipated by the Deferred Maintenance DD Plans and Specifications. The
152 City will use its best efforts to complete this work in accordance with the Project Schedule.
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154 3.1.2 Improvements. Subject to the Improvements Budget, the City will be responsible
155 for constructing the Improvements. The City will use its best effort to complete construction of
156 the Improvements in accordance with the Project Schedule.
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158 3.1.3 Club Work. (a) Club intends to perform certain improvements to the
159 Ballpark at the same time as the City intends to perform the Deferred Maintenance and
160 Improvements Scopes of Work. In particular, Club intends to purchase and install signage in the
161 outfield area, to procure and install concessions and retail facilities equipment in several areas of
162 the Ballpark, and to procure and install additional acoustical equipment for the Ballpark sound
163 system. Club expects that the cost of these items to be between One Million Dollars
164 (\$1,000,000.00) and Two Million and No/100 Dollars (\$2,000,000.00). The concessions and
165 retail facilities equipment and the sound system equipment that are part of the Improvements
166 identified in Exhibit B, shall count towards Club’s \$1,000,000 contribution to the cost of the
167 Improvements as described in Section 3.2.2.
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169 (b) With approval from the City, Club will have the right to increase the scope of the
170 Improvements, or to increase the scope of Club Work, at its own cost, to make improvements
171 that are intended to increase the operating efficiency of the Ballpark or to reduce the cost of
172 utilities.
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174 **3.2 Financial Contributions.**

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176 3.2.1 Deferred Maintenance. (a) The City will contribute up to Six Million
177 and No/100 Dollars (\$6,000,000.00) toward the Cost of the Deferred Maintenance Scope of
178 Work. Club will pay for any Costs of the Deferred Maintenance Scope of Work that exceeds
179 \$6,000,000.00.
180

(b) If the Cost of the Deferred Maintenance Scope of Work is less than \$6,000,000.00, the City will contribute the Deferred Maintenance Savings to the Cost of the Improvements, subject to a maximum of Six Hundred Thousand and No/100 Dollars (\$600,000.00) and subject to the conditions described in Section 3.2.2(c).

3.2.2 Improvements. (a) The City will contribute up to Six Million and No/100 Dollars (\$6,000,000.00) toward the Cost of the Improvements Scope of Work. Club will contribute One Million and No/100 Dollars (\$1,000,000.00) toward the Cost of the Improvements Scope of Work, which contribution may be, in part, in the form of Club performing as Club Work certain of the Improvements as more particularly described in Section 3.2.4.

(b) If the Cost of the Improvements is less than Seven Million and No/100 Dollars (\$7,000,000.00), the City and Club will reduce each party's respective contributions to the Improvements in accordance with their Improvements Percentage. For example, if the total Cost of the Improvements is \$6,500,000, the City's contribution would be \$5,570,500 and Club's contribution would be \$929,500.

(c) If the Cost of the Improvements is greater than Seven Million and No/100 Dollars (\$7,000,000.00), and if Deferred Maintenance Savings exist, then the City and Club will jointly contribute to any costs that exceed \$7,000,000.00 in accordance with their Improvements Percentage until such time as the Deferred Maintenance Savings is exhausted (collectively, the joint contributions anticipated by this subsection and the Improvements Budget will be referred to as the "Adjusted Improvements Budget").

(d) Club will pay for any Costs of Improvements that exceed the Adjusted Improvements Budget. The City will not be required to contribute any funds in excess of \$6,000,000.00 to the Cost of the Improvements except to the extent of Deferred Maintenance Savings, if any.

3.2.3 Cost Sharing Determination. (a) Club and the City acknowledge the interdependent relationship among the Deferred Maintenance Items, Improvements and Club Work, and the difficulty in determining, with complete precision and accuracy, when a given Cost qualifies as a Deferred Maintenance Item, Improvement or Club Work. When the CMAR proposes a final GMP for acceptance by the City Manager, the City, in consultation with Club, shall evaluate the final GMP and categorize the GMP Scope of Work Cost (including any previously approved early procurement items) according to Deferred Maintenance Items, Improvements, and Club Work. The City, in consultation with Club, shall then take the categorized GMP Costs and include any other Costs incurred, or obligated, by either Party outside the CMAR Contract, such as for design services, purchases, etc., and tally such outside Costs together with the CMAR GMP Costs (hereinafter, collectively referred to as "Total Cost Tally").

(b) Before accepting the final GMP for the Project, the City Manager shall determine the City's financial obligations under the CMAR Contract based upon the Total Cost Tally, including the Deferred Maintenance Items Budget and how much, if any, of a Deferred

Maintenance Savings should be applied to the Improvements Budget. To the extent the GMP exceeds the Total Cost Tally, Club shall accept responsibility for making any such excess payments to the CMAR or the Architect after the City has exhausted the limits of its financial responsibility for the Project. Upon approval of the City Manager's determinations by Club, the City Manager shall accept the proposed, final GMP and the City's financial obligations under the CMAR Contract shall be capped at an amount that will not result in the City exceeding its total financial obligations of Deferred Maintenance Obligations and Improvements under this Development Agreement.

3.2.4 Club Work. (a) Club will pay for all Costs of the Club Work. Club will execute its own construction and procurement contract for these items, although Club may, in its sole discretion, use the CMAR as its general contractor.

(b) Prior to the date when the City's CMAR advertises for bids for the construction work, Club and City shall agree upon those items, if any of the Improvements that Club will assume direct responsibility for procuring, constructing, and installing. The City acknowledges and agrees that any or all of the following Improvements would be acceptable to the City: concessions equipment, concessions kiosks and portables, any or all of the concessions Improvements, FF&E, and Club's office Improvements.

(c) The City will have the right to approve the Club Work, which approval the City shall not unreasonably withhold, condition, or delay. The City's Authorized Project Manager will have authority to exercise the City's approval rights.

3.2.5 Minimum Club Investment. (a) Club will make or cause to be made a Minimum Club Investment of at least Two Million and No/100 Dollars (\$2,000,000.00) to the Project. Upon completion of the Project, Club will provide to the City evidence of its Costs for Club Work to allow the City to determine if Club, through its investment in Club Work and Club's contribution to the City for the Improvements, satisfied the Minimum Club Investment required by this Agreement. The City acknowledges that Club, prior to the Effective Date, incurred Costs for the Project, which amounts are itemized in Exhibit D. These Costs shall qualify toward satisfying the Minimum Club Investment requirement.

(b) In the event Club fails to contribute an amount equal to or greater than the Minimum Club Investment, then Club shall be obligated to pay to the City an amount equal to the difference between the Minimum Club Investment and the amount Club actually contributed.

3.2.6 Sales Taxes. To the extent the City has the right to receive a refund of sales taxes from the State of North Carolina, and provided the CMAR provides to the City the necessary evidence of the amount of sales taxes that were paid, any refundable sales tax amount shall not be counted as part of the Deferred Maintenance Items Budget or the Improvements Budget or the City's financial contribution to either.

3.3 Design Services. (a) The City will execute the Architect Contract with the Architect contemporaneously with the execution of this Development Agreement.

(b) The City acknowledges that the Architect prior to the date of this Agreement had commenced its design services under the Architect Contract and has prepared the Deferred Maintenance DD plans and specifications and the Improvements DD plans and specifications (hereinafter, collectively referred to as the “DD Plans and Specifications,” which, although not complete, represent the design intent of the Parties.

(c) The City acknowledges that Club has paid the Architect for certain services necessary to prepare the DD Plans and Specifications, which amount as of the date of this Agreement is Eighty Thousand, Seven Hundred, Thirty-Seven and 80/100 Dollars (\$80,737.80). Club’s payments to the Architect will qualify toward satisfying Club’s Club Investment.

(d) The City’s financial obligations under the CMAR Contract shall be capped at an amount that will not cause the City to exceed its total financial obligations for the Deferred Maintenance Obligations and Improvements under this Development Agreement. Upon the Effective Date, and subject to this section, the City will be responsible for paying the Architect per the Architect Contract.

3.4 Construction Services. (a) The City will execute the CMAR Contract with the CMAR contemporaneously with the execution of this Development Agreement. The City acknowledges that the CMAR prior to the date of this Agreement had commenced its pre-construction services under the CMAR Contract.

(c) The City’s financial obligations under the CMAR Contract shall be capped at an amount that will not cause the City to exceed its total financial obligations for the Deferred Maintenance Obligations and Improvements under this Development Agreement. Upon the Effective Date, and subject to this section, the City will be responsible for paying the CMAR per the CMAR Contract..

3.5 Club’s Designation as the “Owner’s Designated Representative.”

3.5.1 Design. (a) The City hereby designates Club as the “Owner’s Designated Representative” to the Architect, and, in that capacity, Club will supervise the Architect’s services. The Parties acknowledge that the Plans and Specifications are not yet complete. Club will supervise the Architect’s completion of the Plans and Specifications and will advise the City of any material and substantial modification to the Plans and Specifications that is inconsistent with the design intent of the DD Plans and Specifications.

(b) If the Cost of the Improvements is projected to exceed the Adjusted Improvements Budget (subject to adjustment for any Improvements work that Club assumes direct responsibility for pursuant to Section 3.2.4), Club will have the right to delete items from the list of Improvements to reduce the Cost of the Improvements to the amount of the Adjusted Improvements Budget without the City’s approval.

(c) Except for the right to reduce the scope of the Project under the circumstances described in Section 3.6.1(b), the City will have the right to approve all design

decisions, which approval the City shall not unreasonably withhold, condition, or delay. The City's Authorized Project Manager will have authority to exercise the City's approval rights.

3.5.2 Construction. Club will serve as the "Owner's Designated Representative" to the CMAR and will supervise the CMAR's services. In its capacity as Owner's Designated Representative, Club represents and warrants to the City that it shall have a fiduciary duty to represent the best interests of the City in managing and overseeing the Scope of Work. Club acknowledges that any work performed with City funds must comply with applicable state bidding and public contracting requirements, and decisions made by Club must be consistent with the Legal Requirements. Club shall regularly coordinate and cooperate with the City's Authorized Project Manager for the Project during the management and oversight of the Scope of Work. In its capacity as the Owner's Designated Representative, Club will have the authority to make certain decisions after the end of the Preconstruction Period without the City's approval; however, except as provided below, Club shall not have the authority to approve any modifications to the CMAR Contract that increases the City costs or liabilities under the CMAR Contract without prior authorization from the City's Authorized Project Manager. Subject to the aforementioned restrictions, Club is authorized to make the following decisions without prior authorization from the City:

(a) Club may authorize change orders that accelerate the schedule of construction provided Club will pay the CMAR or City (at the City's discretion) any resulting increase in the Contract Sum or costs associated with the acceleration of the Project;

(b) Club may authorize change orders that are recommended by the CMAR and approved by the Architect that modifies the means and methods of construction, but not the design intent of the item under consideration;

(c) Club may authorize change orders that have the effect of spending any Allowances provided in the CMAR Contract or of establishing the final price of any items that were bid as unit prices;

(d) Club may choose to accept any add alternates or deduct alternates made a part of the Plans and Specifications; and

(e) Club may authorize change orders that have the effect of maximizing opportunities for S/DBE Contractors.

The City must authorize all other decisions, which authorization shall not be unreasonable withheld, conditioned, or delayed. The City retains the right to increase the scope of the Deferred Maintenance Items or the Improvements, and to direct the Architect to issue a change order for that purpose, provided, however, the City shall pay for any resulting increased costs of the change order, including costs relating to acceleration made necessary in order to meet the scheduled completion date of the Project.

3.6 Procurement. (a) The City acknowledges that Club has suggested that the City purchase certain items directly and not through the CMAR, and the City has agreed to

Club's recommendation. The items the City and Club agree will be purchased directly by the City are the following: stadium lights and stadium seats. Club, as the City's representative, will work with the Architect to prepare a set of bid specifications, if necessary, to comply with the Legal Requirements for those items selected by the City and Club for direct procurement.

(b) The City has determined that the required seat replacement and stadium lighting upgrades qualify as a sole-source exception to the state bidding requirements because either the product is available from only one source of supply or standardization and compatibility are the overriding consideration in procuring these goods and services. Accordingly, the City agrees to procure the purchases of the stadium lights and stadium seats to be incorporated into the Scope of Work.

(c) Any cost of purchases made by the City outside of the CMAR Contract but to be incorporated into the Scope of Work (e.g., stadium lighting, stadium seats, etc.) shall count towards the City's financial obligations for the applicable Deferred Maintenance Items Budget or Improvements Budget.

3.7 Project Management Oversight. (a) Club shall have a designated individual to act as the Owner's Designated Representative responsible for oversight of both the Architect and the CMAR during the Project. It is not required, however, that Club's designated individual be present at the construction site at all times. At the City's expense and not included in the Project Budget, the City shall have the right to maintain its field personnel or other designees at the construction site to observe the CMAR's construction, or to attend the CMAR's meetings, if any, on the construction site. No such observation or attendance by personnel or designees of the City shall impose upon the City responsibility for failure by Architect or the CMAR to observe any laws or safety practices in connection with such construction.

(b) Neither the City's public representative nor City's Authorized Project Manager, if any, will have control over, will be in charge of or will be responsible for construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the work, since these are solely the CMAR's responsibility. Additionally, neither the City's public representative nor City's Authorized Project Manager has authority to bind the City.

(c) The City may at any time and from time to time, without prior notice to or approval of Club or the CMAR, replace the City's public representative or City's Authorized Project Manager, if any, with a new City representative. Upon receipt of notice from the City informing Club of such replacement and identifying the new City representative, Club shall recognize such person or firm as City's representative for all purposes under this Agreement.

(d) The City's public representative and City's Authorized Project Manager, if any, their consultants, and other persons authorized by City will at all times have access to the work wherever it is in preparation or progress.

(e) The City shall have the right to periodically conduct inspections and tests, at its own expense not included in the Project Budget, on the work performed by the CMAR using its own project manager, employees or a third party for the purpose of independently verifying compliance with the Plans and Specifications. If Club or the CMAR unreasonably interfere with such inspection or tests after being given prior notice by the City of such test or inspection, Club or the CMAR, as the case may be, shall be responsible for added or extra costs resulting from such unreasonable interference.

3.7 Negotiated Lease Agreement. The City and Club have negotiated a new lease agreement that will establish revised terms for Club's use and occupancy of the DBAP on a long-term basis. The negotiated lease agreement is subject to the applicable state bidding laws. The parties acknowledge that execution of the new lease agreement is a condition to both parties willingness to perform each party's respective obligations under this Development Agreement. If, for some reason, the Parties do not execute the new lease agreement prior to July 1, 2013, then either party may terminate this Development Agreement.

4.0 TERM

This Agreement shall expire as of the date each party completes the construction activity contemplated herein for which it is responsible.

5.0 UNAVOIDABLE DELAYS

Notwithstanding anything contained herein to the contrary, the performance by Club and City of each party's work under this Agreement and any deadlines or other specific dates shall be subject to being extended for the duration of any unavoidable delays. For purposes of this Agreement, "unavoidable delay" or "unavoidable delays" means any delay, obstruction or interference with the work resulting from any act or event provided that such act or event is beyond the reasonable control of the party seeking to rely upon this Section, was not separately or concurrently caused by any willful act or omission or negligent act or omission of such party, and could not have been prevented by reasonable actions of the such party, including, but not limited to, delay, obstruction or interference resulting from:

5.1 An act of God (but not including reasonably anticipated weather conditions for the geographic area), lightning, landslide, sinkhole, earthquake, fire, explosion, flood, sabotage or similar occurrence; acts of a public enemy; acts of terrorism, extortion, or blockade or insurrection, riot or civil disturbance.

5.2 Restraint of applicable laws;

5.3 The failure of any utility to provide and maintain utilities services, water and sewer lines, and power transmission lines to the work which are required for the construction or completion of the alterations and renovations or for other obligations of the City or of Club;

5.4 Any unforeseeable condition at the site of the work which shall prevent, or require a change in, the scope or work, or adversely affect the completion schedule for said work.

5.5 Strikes, work stoppages or other substantial labor dispute; and

5.6 Delays caused by the presence of any hazardous waste conditions not previously known.

Notwithstanding the above, the sole remedy to either party for any such unavoidable delay shall be time extensions or the right to accelerate the construction. There shall be no damages for any unavoidable delay.

6.0 INDEMNIFICATION

6.1 Club's Obligation to Indemnify. To the fullest extent permitted by law, Club shall indemnify, defend, and save harmless the City and the City's officers, employees, agents and contractors (hereinafter the "Indemnitees") against and from all liabilities, suits, obligations, fines, damages, penalties, losses, claims, costs, charges and expenses, including, without limitation, attorneys' fees and disbursements (hereinafter collectively referred to as "Charges"), which may be imposed upon or asserted against or reasonably incurred by the Indemnitees arising out of, relating to, or resulting from this Agreement as a result of acts or omissions of the Club or subcontractors or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. Without limiting the preceding sentence, and as an additional obligation of Club, it is agreed that Club shall indemnify, defend, and hold harmless the Indemnitees from and against all Charges made by independent contractors, including subcontractors of all tiers, where the independent contractor was engaged by Club to perform Club Work. Notwithstanding the foregoing, these obligations to indemnify, defend, and save harmless the Indemnitees shall not extend to Charges which may be imposed upon or asserted against or reasonably incurred by the Indemnitees arising as a result of or in connection with the acts or omissions of the Indemnitees.

6.2 Club's Obligation to Defend. If any claim, action or proceeding is made or brought against any Indemnitee by reason of any event as to which Club is required to indemnify any Indemnitee pursuant to Section 6.1, then, upon demand by such Indemnitee, Club, at its sole cost and expense, shall resist or defend such claim, action or proceeding in such Indemnitee's name, if necessary, by the attorneys for Club's insurance carrier (if such claim, action or proceeding is covered by insurance), and otherwise by such attorneys as the City and Club shall mutually approve. The City agrees that in the event the City is named as a party to an action, the City will reasonably cooperate with Club in the conduct of the proceedings.

6.3 Survival. The provisions of this Article shall survive the termination or expiration of this Agreement.

7.0 MISCELLANEOUS

7.1 **City Policy.** THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

7.2 **EEO Provisions.** In this section, "the Contractor" means Club and "this Contract" means this Agreement. During the performance of this Contract the Contractor agrees as follows:

7.2.1 The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. The Contractor shall take affirmative action to insure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. Such action shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions.

7.2.2 The Contractor shall in all solicitations or advertisement for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap.

7.2.3 The Contractor shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding.

7.2.4 In the event of the Contractor's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this Contract, in whole or in part, and the City may declare the Contractor ineligible for further City contracts.

7.2.5 Unless exempted by the City Council of the City of Durham, the Contractor shall include these EEO provisions in every purchase order for goods to be used in performing the Club Work and in every subcontract related to the Club Work so that these EEO provisions will be binding upon such subcontractors and vendors.

7.3 **Equal Opportunity/Equity Assurance.** The provisions of this section 7.3 shall apply only to Club Work that consists of contracts of \$100,000 or more.

7.3.1 **General Requirements.**

(a) Club shall meet with the Director of the City's Department of Equal Opportunity/Equity Assurance (EO/EA) annually to discuss potential contracting opportunities for goods and services for small disadvantaged businesses certified by the City (SDBEs).

(b) The Director may set project specific goals as the Director determines to be generally applicable under Article III of Chapter 18 (as amended from time to time) in City contracting.

(c) In all solicitations for which goal(s) are established, Club will not enter into contracts for goods or services without first soliciting bids from SDBEs and requiring bidders to submit a Participation Plan to meet the goal(s). Bidders must state their SDBE participation in a manner like that required by bidders on contracts to be awarded by the City. If a bidder fails to achieve the goal(s), the bidder must submit documentation to Club of its good faith efforts to achieve the goal(s) within two working days after bid opening. Club shall take all reasonable actions needed to see that bidders comply with this subsection. Club shall make bids and documentation of good faith efforts available to the Director.

(d) Club will notify the Director of EO/EA of upcoming contracting opportunities to ascertain the availability of SDBEs that might be capable of supplying the pertinent goods or services. Each such notice shall be given in a manner and schedule so that the SDBEs will have a reasonable amount of time to respond.

(e) Club will provide quarterly reports using the attached form, "Exhibit E" (CITY OF DURHAM SUBCONTRACTOR QUARTERLY RECORD OF PAYMENT REPORT), on all contracting activity to the Director for reporting to the City Council. The reports are due the last day of April (for January - March), July (for April - June), October (for July - September) and January (for October - December).

(f) Club shall comply with all applicable provisions of Article III of Chapter 18. The failure of Club to comply with that chapter shall be a material breach of contract which may result in the rescission or termination of this Agreement and/or other appropriate remedies in accordance with the provisions of that chapter, this Agreement, and State law. The Participation Plan submitted by Club in accordance with that chapter is binding on Club.

(g) Section 18-59(f) of Article III of Chapter 18 provides, in part, "If the City Manager determines that [Club] has failed to comply with the provisions of [this Agreement], the City Manager shall notify [Club] in writing of the deficiencies. [Club] shall have 14 days, or such time as specified in [this Agreement], to cure the deficiencies or establish that there are no deficiencies." It is stipulated and agreed that those two quoted sentences apply only to [Club's] alleged violations of its obligations under Article III of Chapter 18 and not to [Club's] alleged violations of other obligations.

7.3.2 Remedies. The Parties recognize that the City considers the obligations of Club under subsection 7.3.1 above to (1) further an important policy of the City for the benefit of the public; (2) be material to this Agreement, and (3) be part of the reason that the City is willing to enter into this Agreement. The Parties recognize that the City will suffer financial loss if Club does not comply with its obligations under subsection 7.3.1. The Parties recognize that the City could terminate this Agreement if Club materially breaches its obligations under subsection 7.3.1, and that such a termination would result in monetary losses to the City. The Parties also recognize

the delays, expense, and difficulty to both Parties involved in proving or contesting the amounts of those losses. Instead of requiring proof of those amounts, it is agreed that Club shall be liable for and shall pay the City the amount specified herein as liquidated damages, and not as a penalty. The amounts stated as liquidated damages are agreed to be reasonable estimates of the City's losses and expenses for delays, including administrative costs. The City may collect liquidated damages by retaining moneys otherwise due Club in the amount of such damages, and by other legal means. Nothing in this subsection 7.3.2 shall reduce the City's rights under other provisions of this Agreement, any applicable statutes or ordinances, or any applicable principle of law. In its discretion, the City may waive some or all liquidated damages against Club. Such a waiver is valid only if done by a signed writing that refers specifically to this subsection 7.3.2 and specifically mentions "liquidated damages." If the City seeks an injunction to require compliance with any portion of subsection 7.3.1, Club hereby agrees to waive any contention that the injury from the noncompliance would not be irreparable or that the City has an adequate remedy at law.

The damages shall be as follows:

For Club's failure to comply with subsection 7.3.1(a): \$200 for the first two weeks of noncompliance; \$300 for the second two weeks of noncompliance; and \$200 for each subsequent week.

For Club's failure to comply with subsection 7.3.1 (c), except for failure to make bids and documentation of good faith efforts available to the Director: One percent of the amount of the payments made by Club under each contract entered into in violation of subsection 25.3.1(c), unless the goals were met or good faith efforts were made with respect to that contract.

For failure to make bids and documentation of good faith efforts available to the Director as required by subsection 7.3.1(c): \$100 for the first week of noncompliance; \$200 for the second week; and \$300 for each subsequent week.

For noncompliance with subsection 7.3.1(d): One percent of the amount of the payments made by Club under each contract entered into in violation of subsection 8.6.1(d), unless the goals were met or good faith efforts were made with respect to that contract.

For noncompliance with subsection 7.3.1(e): \$200 for the first two weeks of noncompliance; \$300 for the second two weeks of noncompliance; and \$200 for each subsequent week,

7.3.3 Definitions. In this document, words, including "SDBE" and the "Director" shall have the meaning assigned in Article III of Chapter 18, unless the context requires otherwise. "Article III of Chapter 18" means Article III of Chapter 18 of the Durham City Code (Equal Business Opportunities Ordinance).

7.4 Compliance with Applicable Law. In connection with this Agreement, Club shall, at Club expense, comply with all present and future laws, ordinances, codes, orders and regulations of any lawful authority having jurisdiction over the Ballpark. Club shall not use or occupy, nor permit or suffer the Ballpark to be used or occupied: (i) for any unauthorized, unlawful, illegal, disreputable, dangerous,

noxious or hazardous business, use or purpose; (ii) in such manner as to constitute a nuisance of any kind (public or private); (iii) in violation of any licenses or permits pertaining to the Ballpark or activities and events on the Ballpark; (iv) in a manner which causes or results in any waste on the Ballpark; (v) for any purpose or in any way in violation of the certificates of occupancy or of any laws, ordinances, orders or regulations of any lawful authority having jurisdiction over the Ballpark; or (vi) in a manner which may make void or voidable any insurance then in force on the Ballpark. Upon the discovery of any such unauthorized, unlawful, illegal, disreputable, dangerous, noxious, hazardous or other improper use, Club shall immediately take all necessary steps, legal and equitable, to compel the discontinuance of such use.

7.5 Waiver. No failure by the City or Club to insist upon the strict performance of any provision of this Agreement or to exercise any right or remedy upon a breach of such provision shall constitute a waiver of any such breach or of such provision. No provision of this Agreement to be performed or complied with by Club or the City, and no breach of such provision, shall be waived, altered or modified except by a written instrument executed by the City or Club, as applicable. No waiver of any breach shall affect or alter this Agreement, but each and every provision of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach.

7.6 Agency. Nothing in this Agreement is intended or shall be interpreted to create a joint venture or partnership between the City and Club or make the City the partner of Club or constitute either the agent of the other, or make either party in any way responsible for the debts, losses, duties, obligations, responsibilities or liabilities of the other party. Club agrees that it will not represent to anyone that its relationship to the City under this Agreement is other than as a lessee and independent contractor.

7.7 No Third Party Beneficiaries. The City and Club acknowledge and agree that neither intends this Agreement to confer direct benefits upon any persons other than themselves, that any benefits other persons may receive are purely incidental, and that neither intends to confer any contractual or other rights, including the right to enforce all or any portion of this Agreement, upon any such persons.

7.8 Inspection and Right of Entry. The City shall have the unrestricted right to enter upon the Ballpark, including any and all portions used or occupied by Club. For any portion of the Ballpark being used or occupied by Club pursuant to this Agreement at the time of such entry, the City shall provide reasonable prior oral notice to Club.

7.9 Cost of Compliance. Except where otherwise explicitly provided in this Agreement, Club shall bear the sole cost and expense of complying with and performing all of the duties and obligations of Club under this Agreement, and the City shall bear the sole cost and expense of complying with and performing all of the duties and obligations of the City under this Agreement.

7.10 Performance of Government Functions. Notwithstanding anything in this Agreement which may be to the contrary, nothing contained in this Agreement shall in any way estop, limit or impair the City from exercising or performing any regulatory, policing, legislative, governmental or other powers or functions with respect to the Ballpark or otherwise, including, by way of illustration

but not limitation, inspection of the Ballpark in the performance of such functions and exercise of the power of eminent domain with respect to the Ballpark

7.11 Severability. If any provision of this Agreement or its application to any person or circumstances shall, to any extent, be or become invalid or unenforceable, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby. Each provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law. The City and Club agree to substitute for such provision of this Agreement or the application thereof determined to be invalid or unenforceable, such other provision as most closely approximates, in a lawful manner, such invalid, illegal or unenforceable provision. If the City and Club cannot agree, they shall apply to a court of competent jurisdiction to substitute such provision as the court deems reasonable and judicially valid, legal and enforceable. Such provision determined by the court shall automatically be deemed part of this Agreement as of the date the provision of this Agreement or application thereof which such provision replaces was determined to be invalid or unenforceable.

7.12 Choice of Law. This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina. Any litigation arising out of this Agreement shall be brought in courts sitting in North Carolina.

7.13 Binding Effect. All benefits, privileges, burdens, obligations and duties created by this Agreement shall bind, attach and inure to the benefit and burden of the successors and assigns of the City and Club. This Section shall not be interpreted so as to confer any independent right in Club to convey, transfer or assign any such benefits, privileges, burdens, obligations and duties.

7.14 Notices. Except where oral notice has been explicitly provided for in this Agreement, any notice required to the City or Club by the terms of this Agreement shall be in writing and be deemed given and received on the date of the mailing of such notice in writing to the City or Club, as the case may be, provided such notice is transmitted by certified or registered mail, return receipt requested, postage prepaid, and addressed to the party due such notice as follows:

To the City:
Thomas Bonfield
City Manager
City of Durham
101 City Hall Plaza
Durham, NC 27701
Fax (919) 560-4949.

With a copy to:
Director of General Services
City of Durham
2011 Fay Street
Durham, NC 27704
Fax (919) 560-4196

To Club:
The Durham Bulls Baseball Club, Inc.
409 Blackwell Street
Durham, North Carolina 27701
Attn: George W. Habel, Vice President

With a copy to:
The Durham Bulls Baseball Club, Inc.
2619 Western Boulevard
Raleigh, North Carolina 27606
Attn: General Counsel

The parties shall, by written notice to the other party, each have the right to change the person and address to which notices are to be sent.

7.15 Headings. The table of contents and all headings that appear after article and section numbers in this Agreement are included for convenience only and shall not affect the construction or interpretation of the provisions of this Agreement.

7.16 Entire Agreement. This Agreement contains and represents the entire and integrated agreement between the City and Club and supersedes all prior negotiations, representations or agreements, whether written or oral. With the exception of the Lease Agreement, there are no promises, agreements, conditions, inducements, warranties or understandings, written or oral, express or implied, between the parties other than as set forth or referenced in this Agreement.

7.17 Approval Procedure between the Parties. When a party hereto is herein given the right to consent to or approve any document, plan, specification, proposed action, or any other item in accordance with the provisions of this Agreement, the following procedures shall be followed:

7.17.1 Such document or a written description of the proposed action or work requiring consent or approval shall be submitted by the party having responsibility therefor (the "Requesting Party") in accordance with the notice requirements of Section 7.14, to the party having the right of consent or approval.

7.17.2 Within ten (10) calendar days after the receipt of any written notice requesting consent or approval, the party having the right of consent or approval shall notify the Requesting Party in writing of its consent or approval or of its specific objections to the documents, proposed action, or design change.

7.17.3 Failure to respond with the specific objections within the maximum time period specified herein shall constitute the written consent or approval of the matters contained in the notice requiring approval or consent.

7.17.4 In order to avoid any delay in the design and completion of the Project, it is the intention of the parties that all changes or other matters affecting the schedule and budget for the Project shall be reviewed, approved and handled in the most expeditious manner possible.

IN WITNESS WHEREOF, the City and Club have caused this Agreement to be executed under seal as of the day and year first above written.

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ATTEST:

CITY OF DURHAM

By:_____

Preaudit Certification:

THE DURHAM BULLS BASEBALL CLUB, INC.

ATTEST:

Secretary

(SEAL)

By: _____

President

State of _____

**THE DURHAM BULLS
BASEBALL CLUB, INC.**

County of _____

I, a notary public in and for the aforesaid county and state, certify that

_____ personally appeared
before me this day and stated that he or she is _____ Secretary of **THE DURHAM
BULLS BASEBALL CLUB, INC.**, a corporation, and that by authority duly given and as the
act of the corporation, the foregoing contract or agreement with the City of Durham was signed
in its name by its _____ President, whose name is
_____, sealed with its corporate seal, and attested
by him/herself as its said Secretary or Assistant Secretary. This the _____ day of
_____, 20_____.

My commission expires:

Notary Public

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EXHIBIT A

[Deferred Maintenance Items]

847
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EXHIBIT B
[Improvements]

853
854
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EXHIBIT C
[Project Schedule]

EXHIBIT D

[Minimum Club Investments Incurred as of Agreement]

EXHIBIT E

[CITY OF DURHAM SUBCONTRACTOR QUARTERLY RECORD OF PAYMENT
REPORT]